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Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 77-161)

Countervailing Duties—Cotton Yarn from Brazil

Notice of Countervailing Duty to be imposed under Section 303, Tariff Act of 1930, as amended, by reason of the payment or bestowal of a bounty or grant upon the manufacture, production, or exportation of cotton yarn from Brazil

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER 1—UNITED STATES CUSTOMS SERVICE

PART 159 – LIQUIDATION OF DUTIES

AGENCY: Customs Service, United States Treasury.

ACTION: New Countervailing Duty Rate Declared.

SUMMARY: This notice is to inform the public the countervailing duty rate of 21.4 percent on imports of cotton yarn from Brazil is changed to 19.6 percent of the f.o.b. or ex-works price for export to the United States.

EFFECTIVE DATE: June 21, 1977.

FOR FURTHER INFORMATION CONTACT: Mr. Vincent P. Kane, Duty Assessment Division, United States Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, telephone (202–566–5492).

SUPPLEMENTARY INFORMATION: In the FEDERAL REGISTER of March 15, 1977 (42 FR 14089), there appeared a notice of countervailing duties to be imposed under section 303, Tariff Act of 1930, as amended, by reason of the payment or bestowal of a bounty or grant

upon the manufacture, production, or exportation of cotton yarn from Brazil. Paragraph 9, column 2, states that the amount of such bounties or grants has been estimated and declared to be 21.4 percent of the f.o.b. or ex-works price for export to the United States of cotton yarn from Brazil.

Subsequent to this determination, the Government of Brazil provided information to show that the benefits derived from preferential financing would be less than had originally been established.

Accordingly, the amount of such bounties or grants has been estimated and declared to be 19.6 percent of the f.o.b. or ex-works price for export to the United States of cotton yarn from Brazil.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)) is amended by inserting after the last entry for Brazil the words "Cotton yarn" in the column headed "Commodity", the number of this Treasury Decision in the column headed "Treasury Decision," and the words "Bounty Declared-Rate" in the column headed "Action".

(R.S. 251, secs. 303 amended, 624; 46 Stat. 687, as amended, 759, 88 Stat. 2050; 19 U.S.C. 66, 1303, 1624.)

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department Order 190 Revision 13, May 17, 1977, the provisions of Treasury Department Order No. 165, Revised, November 2, 1954, and § 159.47(d) of the Customs Regulations (19 CFR 159.47(d)), insofar as they pertain to the issuance of a countervailing duty order by the Commissioner of Customs, are hereby waived.

(APP-4-05)

Dated June 14, 1977:

HENRY C. STOCKELL, JR.,
Acting General Counsel of the Treasury.

[Published in the FEDERAL REGISTER June 21, 1977 (42 FR 31449)]

(T.D. 77-162)

Countervailing Duties—Certain Scissors and Shears from Brazil

Notice of Countervailing Duty to be imposed under Section 303, Tariff Act of 1930, as amended, by reason of the payment or bestowal of a bounty or grant upon the manufacture, production, or exportation of certain scissors and shears from Brazil

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

upon the manufacture, production, or exportation of cotton yarn from Brazil. Paragraph 2, column 2, states that the amount of such bounties or grants has been estimated and declared to be 15.1 percent of the f.o.b. or ex-works price for export to the United States of cotton yarn from Brazil.

Subsequent to this determination, the Government of Brazil provided information to show that the benefits derived from such granted financing would be less than had originally been anticipated.

Accordingly, the amount of such bounties or grants has been estimated and declared to be 10.6 percent of the f.o.b. or ex-works price for exports to the United States of cotton yarn from Brazil.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)) is amended by inserting after the last entry for Brazil the words "Cotton yarn" in the column headed "Commodity", the number of this Treasury Decision in the column headed "Treasury Decision," and the words "Bounty Declared Rate" in the column headed "Action".

(R.S. 251, sec. 303, as amended, 624, 46 Stat. 687, 759, as amended; 88 Stat. 2050; 19 U.S.C. 66, 1303, 1624.)

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department Order 190 (Revision 13), May 17, 1977, the provisions of Treasury Department Order No. 165, Revised, November 2, 1954, and § 159.47(d) of the Customs Regulations (19 CFR 159.47(d)), insofar as they pertain to the issuance of a countervailing duty order by the Commissioner of Customs, are hereby waived.

(APP-2-03)

Dated June 14, 1977.

[illegible],
Acting General Counsel of the Treasury.

(Published in the Federal Register June 21, 1977 (42 FR [illegible]))

(T.D. 77-[illegible])

Countervailing Duties—Certain Scissors and Shears from Brazil

Notice of countervailing duty to be imposed under section 303, Tariff Act of 1930, as amended, by reason of the payment or bestowal of a bounty or grant upon the manufacture, production, or exportation of certain scissors and shears from Brazil

Department of the Treasury,
Office of the Commissioner of Customs,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER 1—UNITED STATES CUSTOMS SERVICE

PART 159 – LIQUIDATION OF DUTIES

AGENCY: Customs Service, Treasury Department

ACTION: Liquidation of Duties

SUMMARY: This notice is to inform the public of the amount of countervailing duty which will be assessed on certain scissors and shears exported from Brazil.

EFFECTIVE DATE: February 11, 1977

FOR FURTHER INFORMATION CONTACT: Mr. Vincent P. Kane, Duty Assessment Division, United States Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5492).

SUPPLEMENTARY INFORMATION: In the FEDERAL REGISTER of February 11, 1977 (42 FR 8634), the Commissioner of Customs gave notice that the United States Customs Service had determined that exports of certain scissors and shears from Brazil are subject to bounties or grants within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303).

The scissors and shears are provided for in the Tariff Schedules of the United States as scissors and shears valued at more than $1.75 per dozen under item number 650.91.

At the time, notice was given that such dutiable scissors and shears from Brazil, if entered for consumption or withdrawn from warehouse for consumption on or after February 11, 1977, would be subject to payment of countervailing duties equal to the net amount of any bounty or grant determined or estimated to have been paid or bestowed. A deposit of estimated countervailing duties in the amount of 17 percent of the f.o.b. or ex-works price was required at the time of entry of the subject merchandise for consumption or upon withdrawal from warehouse for consumption on or after February 11, 1977.

From information received since the issuance of the notice, it has been finally ascertained, determined or estimated that the net amount of the bounty or grant paid or bestowed upon the subject merchandise is 15.8 percent of the f.o.b. or ex-works price, and countervailing duties in this amount will be collected upon the liquidation of all entries of the subject merchandise for consumption or withdrawls thereof from warehouse for consumption on or after February 11, 1977.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 159—LIQUIDATION OF DUTIES

AGENCY: United States Customs Service, Treasury Department.

ACTION: Liquidation of Duties.

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From information received since the issuance of the notice, it has been finally ascertained, determined or estimated that the net amount of the bounty or grant paid or bestowed upon the subject merchandise is 14.8 percent of the f.o.b. or ex-works price, and countervailing duties in this amount will be collected upon the liquidation of all entries of the subject merchandise for consumption or withdrawals thereof from warehouse for consumption on or after February 11, 1977.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)) is amended by inserting in respect of the commodity "Certain scissors and shears from Brazil," the number of this Treasury Decision in the column headed "Treasury Decision" and the words "Final rate declared" in the column headed "Action."

(R.S. 251, secs. 303, as amended, 624; 46 Stat. 687, 759, 88 Stat. 2050 (19 U.S.C. 66, 1303), as amended, 1624.)

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department Order 190 Revision 13, May 17, 1977, the provisions of Treasury Department Order No. 165, Revised, November 2, 1954, and § 159.47(d) of the Customs Regulations (19 CFR 159.47(d)), insofar as they pertain to the issuance of a countervailing duty order by the Commissioner of Customs, are hereby waived.

(APP-4-05)

Dated June 14, 1977:

HENRY C. STOCKELL, JR.,
Acting General Counsel of the Treasury.

[Published in the FEDERAL REGISTER June 21, 1977 (42 FR 31449)]

(T.D. 77-163)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 13, 1977.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:	
June 6, 1977	$0.2133
June 7, 1977	.2134
June 8, 1977	.2131
June 9, 1977	.2131
June 10, 1977	.2130
Iran rial:	
June 6–10, 1977	$0.0140
Philippines peso:	
June 6–10, 1977	$0.1350
Singapore dollar:	
June 6, 1977	$0.4055
June 7, 1977	.4058
June 8, 1977	.4056
June 9, 1977	.4056
June 10, 1977	.4055
Thailand baht (tical):	
June 6–10, 1977	$0.0450

(LIQ-3)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

(T.D. 77-164)

Foreign Currencies—Certification of Rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., June 13, 1977.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 77-106 for the following countries. Therefore, as to entries covering merchandise

exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Finland markka:	
June 6, 1977	$0.2455
June 7, 1977	.2452
June 8, 1977	.2453
June 9, 1977	.2452
June 10, 1977	.2450
Sweden krona:	
June 9, 1977	$0.2258

(LIQ-3)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

(T.D. 77-165)

Ports of Entry—Customs Regulations amended

Changes in the Customs Field Organization, sections 1.2(c) and 1.3(d), Customs Regulations, amended

DEPARTMENT OF THE TREASURY,
Washington, D.C., June 8, 1977.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 1 – GENERAL PROVISIONS

AGENCY: United States Customs Service, Treasury

ACTION: Final Rule

SUMMARY: This document contains changes in the field organization of Customs Region I (Boston, Massachusetts). The changes were prompted by changing traffic patterns in the area. The organizational changes are intended to increase management effectiveness and to better serve the public.

EFFECTIVE DATE: 30 days after publication in the FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT:

Richard M. Belanger, Attorney, Regulations and Legal Publications Division, United States Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202–566–8237).

SUPPLEMENTAL INFORMATION:

BACKGROUND

On August 25, 1975, a notice of a proposal to change the field organization of Customs Region I was published in the FEDERAL REGISTER (40 FR 37043). Interested parties were given until September 24, 1975, to submit data, views, or arguments with respect to the proposal. Five comments were received from the public in response to the notice, one of which was favorable.

DISCUSSION OF COMMENTS

The one favorable commenter felt that the proposed changes would benefit importers by improving management and by broadening the experience of Customs officers.

The objectors to the proposed changes argued that it will burden the Customs officers servicing the area with additional automobile travel under hazardous driving conditions and result in a loss in permitted travel allowances.

A study conducted by the District Director of Customs, St. Albans, Vermont, shows that the proposed Highgate Springs/Alburg consolidation will result in a net increase in mileage of only 4,468 miles per year or 154 miles per affected Customs officer for that period. Therefore, the effect on each Customs officer will be minimal. While the Customs Service is concerned about the safety of its employees, it does not believe that the issue of hazardous driving conditions is a major issue in the consolidation. Such conditions will always prevail on all roads in the area during inclement winter weather.

In regard to the question of travel allowances, Customs officers going to assigned duty stations within port limits are not reimbursed for that travel. Therefore, some employees will probably find themselves assigned to more distant duty posts without reimbursement for costs that were allowed when these ports were outside the narrower port limits. However, if a Customs officer is required to travel from his assigned station to another station within the new consolidated

port of entry, during a period of duty, he will receive travel expenses for that additional travel. This should reduce any adverse economic impact on the Customs officer.

Special benefits can be expected from the variety of work assignments that will become available for Customs officers within the larger consolidated port. Because of rotation of assignments, all of the Customs officers will receive more diversification and training than at present. This will enhance the career opportunities of these officers.

After consideration of all comments received, it has been decided to adopt the changes as proposed. We have concluded that these changes will provide better service to the public and contribute to a more efficient management of the Customs Service.

DRAFTING INFORMATION

The principal author of this document was Richard M. Belanger, Attorney, Regulations and Legal Publications Division of the Office of Regulations and Rulings, United States Customs Service. However, personnel from other offices of the Customs Service and the Department of the Treasury participated in developing the document, both on matters of substance and style.

AMENDMENTS TO THE REGULATIONS

By virtue of the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949–1953 Comp. Ch. II), and pursuant to the authority provided by Treasury Department Order No. 190, Rev. 12 (41 FR 47970), the following changes in the organization of Region I are hereby adopted as set forth below:

1. A consolidated port of Highgate Springs/Alburg, Vermont, is established, with geographical limits including all points and places within the townships of Highgate, Swanton, and Alburg, and that part of the township of Franklin east of the township of Highgate which is bounded on the east by Richard Road and on the south by State Aid Road 235.

2. The township of Swanton is removed from the port limits of the port of St. Albans, Vermont, and included within the port limits of the new port of Highgate Springs/Alburg, Vermont.

3. The designation of North Troy, Vermont, as a Customs port of entry in the St. Albans, Vermont, Customs district, is revoked.

4. North Troy, Vermont, is designated as a Customs station under the supervision of the port of Derby Line, Vermont.

5. The designation of Alburg Springs, Vermont, as a Customs station under supervision of the port of entry at Alburg, Vermont, and the designation of Morses Line, Vermont, as a Customs station under the supervision of the port of entry at Richford, Vermont, are revoked. (The Alburg Springs and Morses Line, Vermont, locations are included within the port limits of the new port of Highgate Springs/Alburg, Vermont.)

To reflect these changes, the table in section 1.2(c) of the Customs Regulations (19 CFR 1.2(c)) is hereby amended by deleting "Alburg, Vt." and "North Troy, Vt." from the column headed "Ports of Entry" in the St. Albans, Vt., district (Region I); deleting the parenthetical material immediately following "ST. ALBANS, VT." in the column headed "Ports of Entry" in the St. Albans, Vt., district (Region I) and substituting in its place "(including township of St. Albans) (E.O. 3925, Nov. 13, 1923; E.O. 7632, June 15, 1937; 2 F.R. 1042; T.D. 77–165)"; deleting "Highgate Springs, Vt." and the parenthetical material following it in the column headed "Ports of entry" in the St. Albans, Vt. district (Region I) and substituting in its place "Highgate Springs/Alburg, Vt. (including the territory described in T.D. 77–165)."

To further reflect this change, the table in section 1.3(d) of the Customs Regulations (19 CFR 1.3(d)) is hereby amended by inserting "North Troy, Vt." directly below "Newport, Vt." in column headed "Customs stations," with "Derby Line, Vt." designated as the "Port of entry having supervision," in the St. Albans, Vt., district (Region I); and deleting "Alburg Springs, Vt." and Morses Line, Vt." from the column headed "Customs stations" and the corresponding entries from the column headed "Port of entry having supervision" in the St. Albans, Vt., district (Region I).

(Sec. 1, 37 Stat. 434, sec. 1, 38 Stat. 623, as amended (5 U.S.C. 301, 19 U.S.C. 1, 2))

(ADM–9–03)

BETTE B. ANDERSON,
Under Secretary of the Treasury.

[Published in the FEDERAL REGISTER June 27, 1977 (42 FR 32534)]

237–843—77——3

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4700)

CARMICHAEL INTERNATIONAL SERVICE *v.* UNITED STATES

Wigs

EXPORT VALUE—SUCH MERCHANDISE

Imported merchandise was appraised on the basis of export value based on prices for *similar* merchandise. Plaintiff claimed that while export value was the proper basis of appraisement, the correct export values were represented by the actual prices paid to the manufacturer of *such* merchandise, as set forth in the invoices. Under the statutory provisions covering export value, consideration must be given to the value of "such" merchandise, i.e. identical merchandise produced by the same manufacturer, before consideration can be given to the value of "similar" merchandise. Thus, in the present case, plaintiff had the burden, among other things, of proving that merchandise made by the same producer which was

identical to the merchandise in question was freely sold or offered for sale for exportation to the United States at prices equal to the invoice prices. Plaintiff, however, failed to meet this burden and the appraised values are affirmed.

Court Nos. R70/9113, etc.

Port of Los Angeles

[Judgment for defendant.]

(Decided June 9, 1977)

Stein, Shostak, Shostak & O'Hara, Inc. (*Marjorie M. Shostak* and *Theo B. Audett* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

MALETZ, Judge: These eight consolidated cases involve the proper dutiable values of certain wigs and other human hair pieces which were sold in Hong Kong for exportation to the United States by Croset & Company, Ltd. of Hong Kong. The merchandise covered by seven of the eight cases was exported from September 1964 through November 1965 and entered at the port of Los Angeles during the same period by Carmichael International Service (Carmichael) for the account of the M. Calig Company of Los Angeles. The merchandise covered by the eighth case was exported in November 1965 and entered at the port of Los Angeles in the same month by Carmichael for the account of the Hong Kong Trading Corporation of Los Angeles.

The imported merchandise was appraised by the government on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, based on prices for *similar* merchandise. Plaintiff agrees that export value is the correct basis of the appraisement, but contends that the correct export values are represented by the actual prices paid to the manufacturer for *such* merchandise, as set forth in the invoices.

THE STATUTE

Section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a) provides as follows:

(b) Export value.

For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence

of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

(f) Definitions.

For the purposes of this section—

(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

* * * * * * *

(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, United States value, or constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

* * * * * * *

The Issue

The question presented is whether plaintiff has proven by a preponderance of the evidence that its claimed values, i.e. the invoice prices, represent the proper dutiable values of the importations in question. This, in turn, depends on whether plaintiff has established that "such" merchandise, i.e. merchandise identical to the merchandise in question, was freely sold or, in the absence of sales, freely offered for sale, in the ordinary course of trade, for exportation to the United States at prices equal to the invoice prices. [1]

The Record

The record consists of (1) an affidavit of Fanny Wan who identified herself as "bookeeper and secretary" of the Croset company (plaintiff's exhibit 1); (2) the testimony of Milton Calig, president of the Calig company; (3) a letter dated July 9, 1965 from Mr. Calig to the customs appraiser of merchandise at Los Angeles (defendant's exhibit A); (4) a customs agent's report dated December 14, 1965 concerning wigs sold by the Croset company (defendant's exhibit B); and (5) the official papers in the eight cases. In addition, the record in *Majestic Electronics, Inc.* v. *United States*, 63 Cust. Ct. 628, R.D. 11686 (1969) was incorporated on motion by plaintiff and over objection by defendant on the ground that it was immaterial.

Summary of Record

Given the circumstances present here, the action is best understood by summarizing the relevant portions of the record starting with plaintiff's exhibit 1, the affidavit executed by Fanny Wan on September 24, 1970 in Hong Kong. In her affidavit Miss Wan states that during the period January 1, 1964 to December 31, 1965 she was bookkeeper and secretary of the Croset company (Croset); that in that capacity she was fully and personally familiar with all sales and offers for sale made by Croset during that period, involving wigs and other human hair pieces, and with their selling prices; that she was fully familiar with sales of wigs[2] by Croset to the Calig company

[1] It is undisputed that the principal market of the country of exportation was Hong Kong and that the prices did not vary with quantities sold.

[2] The term "wigs" as used here and hereafter refers to wigs and to other human hair pieces such as wiglets (which are small hair pieces combed into the hair to make it fuller and more stylish) and ponytails (which are placed on the back of the head to give the impression of long hair).

(Calig); and that all of the sales to Calig consisted entirely of items which were being closed out, or which had been overstocked.

Miss Wan further states in her affidavit that the prices of wigs sold by Croset to Calig varied from time to time, depending upon market conditions, but that such wigs were at all times freely offered for sale, for exportation to the United States, to anyone wishing to purchase, at the same prices at which they were sold to Calig. Attached to the affidavit are copies of an invoice to Calig and an invoice to Hong Kong Trading Corporation of Hollywood, California, dated November 2 and November 8, 1965, respectively,[3] showing identical prices for various wigs, which the affidavit states truly reflect the prices at which the described merchandise was actually sold and "are representative of the uniform practice of Croset of freely offering and selling such merchandise at the same prices to anyone wishing to purchase."

Miss Wan's affidavit further states that no relationship, corporate, financial, or otherwise, existed between Croset and either Calig or Hong Kong Trading Corporation; that sales to both of those purchasers were in the usual course of business, without any restrictions as to disposition or use; and that it was the uniform practice of Croset, during the period January 1, 1964 to December 31, 1965, to offer and sell all wigs on an f.o.b. Hong Kong basis.

Bearing on the matters covered by Miss Wan's affidavit is Customs Form 5515, the Special Customs Invoice which is included in the official papers for all but two of the entries here involved.[4] This Special Customs Invoice shows "Croset & Company, Ltd." of Hong Kong as the seller. Section IV, column (4) of each such invoice shows the invoice unit price or value, while section IV, column (7) shows the "current unit price for export to United States." In each instance, the amount shown in column (4) and column (7) of section IV is the same. Further, question 4(B) of section V and the "x" answer on each Special Customs Invoice in these cases read as follows:

4. * * *

(B)(1) Have you stated in section IV, column 7, the price at which you are now selling the goods or offering them for sale for export to the United States and whether this price is f.o.b., c.i.f., c. & f., or whatever the fact may be? ☒ Yes ☐ No

(2) Is this price freely offered to anyone who wishes to buy the goods for export to the United States? ☐ Yes ☒ No.

[3] The invoice to Calig, dated November 2, 1965, is identical to the invoice in Entry No. 105698, Court No. R70/9118. The other invoice to the Hong Kong Trading Corporation, dated November 8, 1965, is identical to the invoice in Entry No. 106090, Court No. R70/9120.

[4] All the official papers in these cases were received in evidence as an unmarked exhibit on motion of counsel for plaintiff.

Finally, each Special Customs Invoice contains a "PURCHASE DECLARATION" to the effect that all the information contained in the invoice is true and correct and each declaration bears the signature of Gaston O. Croset who is identified on the commercial invoices and packing lists as the managing director of Croset.

We turn next to the testimony of Milton Calig who stated that he is the president of M. Calig Company; that during the years 1964 and 1965 he was an importer of human hair wigs, which his company purchased from the Croset company of Hong Kong; and that he commenced dealing with Croset when Mr. Gaston O. Croset visited him in Los Angeles and offered to sell him some wigs for importation into the United States from Hong Kong. In this connection, Mr. Calig's initial purchases were made around August of 1964 on the basis of samples and prices quoted by Mr. Croset in Los Angeles.

Mr. Calig further testified that in the latter part of 1964 he visited Mr. Croset in Hong Kong and purchased wigs; that he also purchased by cablegram, letter and phone; that he did not bargain with Mr. Croset as to the prices, but paid the quoted prices; and that the prices did not vary with the quantity of hair goods purchased.

The witness stated that in the latter part of 1964 when he was in Hong Kong, he was shown by Mr. Croset a price list on Croset's letterhead which set forth the prices of particular wigs according to color,[5] and he was charged the exact prices shown on the price list. He had no personal knowledge as to whether the price list was shown to anyone other than himself.

Mr. Calig further testified that when he visited Croset in Hong Kong, Mr. Croset offered him the wigs at a closeout price;[6] and that the offer included wigs already made, plus wigs Mr. Croset would have made by his contractor, to dispose of a stock of raw hair which he had purchased from the Van Yee Trading Company and which came from Mainland China.[7] Mr. Calig said that Mr. Croset was anxious to dispose of this stock of hair for a number of reasons: first, because he was afraid the hair from Mainland China would shortly

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[5] However, as shown by the official papers, the first time Calig was charged for wigs according to *color* commenced with the May 25, 1965 exportations. See Entry No. 113562 in Court No. R70/9117. Prior to that, Croset's sales to Calig were at a "flat" or single price per item regardless of color.

[6] The witness testified that he purchased the wigs from Croset for the next 15 months at closeout prices. It is to be noted, however, that in a letter to Customs dated July 9, 1965 (defendant's exhibit A) Mr. Calig stated that "on the majority of these shipments Croset Company, either sold us a product run at a 'close out' price, or they made a special run on a cheap light weight wig with unprocessed oriental hair for us." At trial, Mr. Calig denied that any of the wigs purchased by his company were specially made for his company.

[7] The record indicates that the wigs in question were fabricated for Croset by the Hong Kong Artificial Wig Manufactory.

be embargoed by the United States government, as it ultimately was; second, that the dyeing was of poor quality, the light colors being green and the blond having a greenish tint; and third, that new modacrylic fibers were soon to come in the market and that while he himself did not become aware of such wigs until the latter part of 1965, he assumed that Mr. Croset knew that as soon as modacrylic fibers became available for wigs, wigs made of human hair would no longer be in demand and that availability of modacrylic fibers would have an effect on the price at which human hair pieces would be offered in Hong Kong in 1964 and 1965.[8]

Mr. Calig indicated that he had no personal knowledge as to how many customers Croset had in 1964 or 1965 nor how much such customers paid for the wigs they bought. He added, however, that he had seen actual invoices covering sales of identical wigs to other buyers at prices identical to the prices paid by him. On one occasion, he recalled that Mr. Croset showed him an invoice of another purchaser's order which contained identical prices to those he was paying. At this time Mr. Croset kept his hand over the other importer's name on the top, but Mr. Calig was able to determine it was the Hong Kong Trading Corporation "because as he was showing it to me his hand lifted off and I noticed Hong Kong Trading Company." Finally Mr. Calig made clear that at no time did he have access to the books and records of the Hong Kong Trading Corporation or of Croset.

Relevant, too, is a report concerning the Croset company, dated December 14, 1965, prepared in Hong Kong by Perry J. Spanos, acting senior customs representative, which is contained in the record as defendant's exhibit B. The report noted that Mr. Croset, the managing director of the Croset company, was interviewed and stated that until March of 1965 handmade wigs were sold to Calig for $11.00 each and machine-made wigs for $6.50 each. After March of 1965 there was a substantial change in price so that handmade wigs, depending on color, were invoiced to Calig from $15.95 to $17.95 each, while machine-made wigs were invoiced from $7.00 to $8.30 each. The report further commented that Mr. Croset indicated there were no business documents pertaining to the instant transactions claiming that (1) the letters and order numbers mentioned on the commercial invoices were imaginary; (2) there were no records kept or invoices issued by the Hong Kong Artificial Wig Manufactory (which, as previously mentioned, manufactured the hair goods for Croset from hair supplied by that firm); and (3) in general, there were no documents available to substantiate the unit values. The report added

[8] In general, according to Mr. Calig, three factors determined the price of a wig: (1) whether it was handmade or machine-made; (2) the weight of the particular hair piece; and (3) the quality of the dye.

that Mr. Croset did offer copies of "Cost Calculations" which, it was indicated, could not be substantiated by any business records.

According to the report, the invoiced prices to Calig were extremely low in comparison with substantial quantities of similar wigs exported during 1964–1965 by various other Hong Kong manufacturers to several U.S. importers, in large wholesale quantities, which were at the following *minimum* prices per unit:

1. Hand-made wigs: US$20.00 to US$35.00 depending on color.
2. Machine-made wigs: US$11.50 to US$14.50 depending on color.

The report of the customs representative further noted that the Hong Kong Artificial Wig Manufactory, which fabricated the wigs in question, had been liquidated and that no records were available for examination. However, the report stated that according to the recollection of Chiu Wai Mau, who had been assistant manager of that company, (1) Croset supplied the hair to his firm already bleached and dyed as well as the netting; and (2) all wigs for Croset were manufactured according to specifications and a prearranged color scheme combination and there never were any "seconds" or "discontinued styles" or "close-out" merchandise involved.

OPINION

As previously mentioned, the imported merchandise was appraised by the government on the basis of export value based on prices for *similar* merchandise. However, under the language of section 402(f)(4), *supra*, consideration must be given to the statutory value of "*such*" merchandise, i.e. identical merchandise produced by the same manufacturer,[9] before consideration can be given to the statutory value of "*similar*" merchandise. See, e.g., *Schieffelin & Co.* v. *United States*, 71 Cust. Ct. 209, 214–15, A.R.D. 317, 360 F. Supp. 1386, 1390–91 (1973), *aff'd* 62 CCPA 7, C.A.D. 1135, 504 F. 2d 1147 (1974); Sturm, *A Manual of Customs Law* at 54–55 (1974). Thus, plaintiff had the burden of proving that merchandise made by the same producer which was identical to the merchandise in question was freely sold or, in the absence of sales, freely offered for sale, in the ordinary course of trade, for exportation to the United States at prices equal to the invoice prices. Should plaintiff meet this burden it would not have to disprove the correctness of export value for "similar" merchandise since under the statutory priorities mandated by section 402(f)(4) the latter would not apply.

[9] Plaintiff has not contended that an export value exists for merchandise indentical to the imported merchandise but manufactured by a different manufacturer.

In this setting, we consider first whether plaintiff has proven that "such" merchandise was freely sold to all purchasers for exportation to the United States at prices equal to the invoice prices. On this aspect, there is no competent evidence to establish that the imported wigs were freely *sold* to all purchasers at the invoice unit values. For one thing, Mr. Calig was not competent to testify as to the prices at which *Croset* freely sold his merchandise. The fact that Mr. Calig may have seen a few purported invoices which charged the same prices charged to Calig for identical merchandise cannot establish that the same prices were charged to all. At most, Mr. Calig's testimony shows that some U.S. purchasers other than Calig were charged the same prices. What is more, Mr. Calig was able to see (and then only furtively) only one of the purported purchasers' names, i.e. that of the Hong Kong Trading Corporation. And with specific respect to the Hong Kong Trading Corporation, it is hardly determinative that some of the merchandise was invoiced to that company at the same prices as to Calig.[10]

Further, Fanny Wan's unsupported statement that the copies of the invoices to Calig and to Hong Kong Trading Corporation, showing identical prices for various wigs, reflect the prices at which the merchandise was actually sold and "are representative of the uniform practice of Croset of freely offering and selling such merchandise at the same prices to anyone wishing to purchase" certainly cannot be considered as probative evidence that "such" merchandise was freely sold to *all* purchasers for exportation to the United States at the same price.[11] Indeed, there is no evidence that anyone else "wished" to buy at the prices charged to Calig.

Beyond this, plaintiff contends that Fanny Wan's affidavit and Mr. Calig's testimony establish that the imported merchandise was freely offered for sale to all purchasers for exportation to the United States at prices equal to the invoice prices. For the reasons that follow, the court cannot agree with this argument.

In the first place, Gaston O. Croset, the managing director of the Croset company, quoted the prices for the merchandise to Calig and

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[10] As seen from the official papers, Hong Kong Trading Corporation did not pay $11.00 or $6.50 per wig, or $1.50 or $2.50 per hair piece or wiglet which were the prices charged to Calig through March 8, 1965. Nor did the Hong Kong Trading Corporation pay $7.00, $7.55, $8.30, $9.20, $15.95, $16.80 or $17.95 per wig. Yet these were some of the prices charged to Calig commencing with the May 25, 1965 exportation. Moreover, there is no proof that the Hong Kong Trading Corporation ever imported any hair goods other than those covered by Entry No. 106090 in Court No. R70/9120. Since this merchandise was sold for exportation subsequent to Calig's merchandise, its price canot be used to determine the export value for Calig's merchandise. See *Spanezico, Inc.* v. *United States*, 75 Cust. Ct. 123, C.D. 4616, 405 F. Supp. 1078 (1975), *aff'd* 64 CCPA—, C.A.D. 1176, 542 F. 2d 568 (1976); *B & W Wholesale Co., Inc.* v. *United States*, 63 Cust. Ct. 691, 697–98, A.R.D. 262 (1969), *aff'd* 58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971).

[11] Miss Wan's affidavit and the weight to be given to it are discussed in some detail in a later part of this opinion.

personally signed all the invoices and packing lists in these consolidated actions. Thus, as the managing director of the seller he was clearly the person most competent and qualified to testify regarding Croset's sales practices, sales prices, and offers for sale. Yet, Mr. Croset was never called to testify, nor was his affidavit offered into evidence. These facts support an inference that Mr. Croset's testimony would have been unfavorable to plaintiff. See, e.g., McCormick, *Handbook of the Law of Evidence* § 249, at 533–34 (1954).

Secondly, as previously observed, on the Special Customs Invoices, moved into evidence by plaintiff along with the other official papers, in reply to question 4(B)(2) Mr. Croset specifically indicated that the invoice unit prices *were not* freely offered to anyone who wished to buy the foods for export to the United States. At no time did the plaintiff attempt to explain away this statement by Mr. Croset. Instead, plaintiff's rebuttal on this point lies in the uncorroborated statement in Fanny Wan's affidavit to the effect that the wigs in question were at all times freely offered for sale for exportation to the United States, to anyone wishing to purchase, at the same prices at which they were sold to Calig.

Miss Wan's assertions about transactions which took place five years earlier are unsupported by any reference to books of account, price lists, letters, or other documents except for the two invoices attached to the affidavit. Thus, her affidavit suffers from the same deficiencies as the affidavit in *Andy Mohan, Inc.* v. *United States*, 74 Cust. Ct. 105, 114, C.D. 4593, 396 F. Supp. 1280, 1287–88 (1975), *aff'd* 63 CCPA 104, 107, C.A.D. 1173, 537 F. 2d 516, 518 (1976), and is entitled to little weight. In fact, she even fails to allege that at the time of executing the affidavit she was in possession of any of Croset's books, records, or other documents (except for the two invoices) which enabled her to reach the conclusions set forth in her affidavit. As the appellate court stated in *Andy Mohan*, *supra*, 63 CCPA at 107, 537 F. 2d at 518:

> Evidence should be assessed "in practical terms, considering such factors as completeness, adequacy of bases, and possible motives to deceive," rather than on the basis of artificial distinctions between ultimate and evidentiary facts. *Mannesmann-Meer, Inc.* v. *United States*, * * * [58 CCPA 6, C.A.D. 995, 433 F. 2d 829 (1970)].

Against this background, it is apparent that Miss Wan's affidavit is incomplete, inadequately based, insufficiently supported by records, and in flat contradiction to Mr. Croset's declarations in the Special Customs Invoices.

Finally, Mr. Calig testified that Mr. Croset showed him a price list in the latter part of 1964, which price list set forth the prices of particular wigs according to color and that the prices charged to Calig were the prices set forth in the price list. However, Miss Wan makes no mention of such a price list; Mr. Calig had no knowledge that the price list was ever shown to anyone other than himself; and Croset clearly did not follow such a price list in the latter part of 1964 or first part of 1965 because Calig was not charged prices depending on color until the May 25, 1965 exportations. But even if such a price list existed, there is no showing as to the time when it was in effect or that any offers were ever based on it, much less that all offers were based on it.

In sum, it is clear that the record fails to establish that "such" merchandise was freely sold or offered for sale to all purchasers for exportation to the United States at the same prices, i.e. the invoice unit prices. It is thus evident that plaintiff has failed to prove that its claimed values, i.e. the invoice prices, represent the proper dutiable values of the importations in question.[12] Therefore the appraised values are affirmed and judgment will be entered accordingly.

(C.D. 4701)

INTERNATIONAL FASHIONS *v.* UNITED STATES

Ladies sweaters

ORNAMENTATION—SAMPLE EVIDENCE WITHOUT TESTIMONIAL SUPPORT

Ladies cotton knit sweaters with double banded neck imported from Hong Kong and classified in liquidation under TSUS item 382.00 as modified by T.D. 68–9 as women's *ornamented* wearing apparel, *held*, not classifiable as claimed by the importer under TSUS item 382.06 as modified by T.D. 68–9 as women's wearing apparel, *not ornamented*, where the only evidence adduced by the importer is a sample sweater exhibiting a double banded neck which would not be revealing, upon ocular inspection by a lay person, of any latent functional characteristics, and there being nothing in the testimony of the Government's witness which would affect favorably the importer's burden of proof.

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[12] In view of this conclusion, it is unnecessary to reach the question as to whether the sales in issue were in the ordinary course of trade.

Court No. 76–8–01863

Port of Los Angeles

[Dismissed.]

(Decided June 10, 1977)

Glad, Tuttle & White (*Edward N. Glad* and *T. Randolph Ferguson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise at bar, described on the invoice as "Ladies' knitted 100% cotton roll sleeves, square neck pullover," was exported from Hong Kong on or about March 28, 1976. It was entered and classified in liquidation under TSUS item 382.00 as modified by T.D. 68–9 at the duty rate of 35 *per centum ad valorem* as women's wearing apparel, ornamented, of cotton. It is claimed by the importer that the merchandise should be classified under TSUS item 382.06 as modified by T.D. 68–9 at the duty rate of 21 *per centum ad valorem* as women's wearing apparel, not ornamented, of cotton, knit.

Central to the issue of ornamentation raised by the pleadings herein is the question of whether the upper (or second) banding on the double banded neck of the imported knit cotton sweaters is functional. In this connection it is to be noted that headnote 3(a)(B) of schedule 3 of TSUS, among other things, excludes from the meaning of the term "ornamented" "functional stitching or one row of straight hemstitching adjoining a hem" on fabrics and other articles of textile materials.

At the trial the only evidence adduced by plaintiff was a sample of the merchandise which was received in evidence as exhibit 1. At this point plaintiff's counsel stated (R. 3), "As we feel, in cases like this, the sample speaks louder than words, the plaintiff rests." Exhibit 1 possesses a double banding around the neck portion of the garment.

The only testimony in the record is that of Dr. Joan H. Lare, professor of Home Economics at California State University at Long Beach whose specialty is textiles and clothing. She holds Bachelor of Science and Master of Science degrees in Textiles and Clothing from Cornell University and her Ph. D. degree in Home Economics Education from Cornell University. Dr. Lare, called as a witness on defend-

ant's behalf, testified on direct examination that her understanding of the term "ornamentation" was the embellishment or decoration of clothing by means of the addition of things such as beads, fancy stitching, lace, or an extra piece of fabric or trim (R. 7). The witness stated that in her opinion exhibit 1 was ornamented by virtue of the presence of the second banding at the neck portion of the garment (R. 7–8). She said that, while the first or lower banding served the purpose of finishing the edge of the fabric, and kept the fabric from stretching and raveling, "The second (upper) banding is decorative, begins to be decoration. It is not needed; it is extra. It serves no utilitarian function." (R. 8.)

On cross-examination Dr. Lare testified that the second or upper banding did not give added reinforcement to the garment and did not prevent stretching (R. 11–12). And it was further brought out on cross-examination of the witness that existing testing methods would not show any measurable addition of strength or durability attributable to the presence of the second or upper banding (R. 12–13).

Plaintiff, relying entirely on the sample, argues that two plies of the banded material provide for greater strength in terms of stabilizing the neck against the tendency of the fabric to stretch, than does one ply of material. Defendant counters by asserting, among other things, "Plaintiff's Exhibit 1 only demonstrates, visually, the nature of the merchandise, and its questioned neck banding. It does not, as plaintiff seems to assert, in and of itself demonstrate to a person having no expertise in textiles and clothing that: '. . . the upper (second) banding on the subject merchandise serves a primary utilitarian function of reinforcing the stability of the neck of the garment' (plaintiff's brief, p. 9)."

The court agrees with the defendant. An examination of exhibit 1 would not disclose to a lay person any latent functional characteristics of the upper neck banding. And since the sample is not such that the utilitarian characteristics of the upper neck banding, if any, are brought within the realm of judicial knowledge upon mere ocular inspection, see *United States* v. *Sheldon & Co.*, 13 Ct. Cust. Appls. 53, T.D. 40880 (1925) and *United States* v. *Lee & Co.*, 9 Ct. Cust. Appls. 111, T.D. 37977 (1919), it was incumbent upon plaintiff to adduce testimonial evidence from persons familiar with the manufacture of the garment in issue and the nature and purpose of its double neck banding in order to support its contention and rebut the presumption of ornamentation. Nothing contained in the testimony offered on behalf of the defendant could be said to assist the plaintiff in meeting its burden of proof. *V. W. Davis* v. *United States*, 16 Cust.

Ct. 163, 174, C.D. 1005 (1946), *aff'd*, 35 CCPA 79, C.A.D. 374 (1947). The defendant's evidence establishes that the upper neck banding constitutes ornamentation.

It follows, therefore, that plaintiff has failed to rebut the presumption of correctness attaching to the classification of the merchandise at bar, in consequence of which, this action must be dismissed. Judgment will be entered herein accordingly.

Decisions of the United States Customs Court

Customs Rules Decision

(C.R.D. 77–5)

KNICKERBOCKER LIQUORS CORP. *v.* UNITED STATES

Memorandum Opinion and Accompanying Order

Court No. 74–11–03088

Port of New York

[Motion to dismiss denied.]

(Dated June 9, 1977)

Rode & Qualey (*Peter Jay Baskin* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Laura D. Millman*, trial attorney), for the defendant.

BOE, Judge: Pursuant to rules 4.7(b)(2) and 4.12 of the rules of court, the defendant has moved to dismiss the above-entitled action for lack of jurisdiction because of plaintiff's failure to timely file the summons in said action pursuant to 28 U.S.C., section 2631(a), providing:

> § 2631. Time for commencement of action.
>
> (a) An action over which the court has jurisdiction under section 1582(a) of this title is barred unless commenced within one hundred and eighty days after:
>
> (1) the date of mailing of notice of denial, in whole or in part of a protest pursuant to the provisions of section 515(a) of the Tariff Act of 1930, as amended; or
>
> (2) the date of denial of a protest by operation of law pursuant to the provisions of section 515(b) of the Tariff Act of 1930, as amended.

The following facts, pertinent to the determination of this motion, are undisputed:

(1) the plaintiff filed a protest in the within action on April 26, 1972,
(2) a notice of denial was mailed to the plaintiff on November 1, 1974, and
(3) the plaintiff filed a summons in said action on November 7, 1974.

In support of its motion to dismiss the defendant asserts that the timeliness of the filing of the summons in the instant action must be determined in conjunction with the provisions of 19 U.S.C., section 1515, providing:

> § 1515. Review of protests; administrative review and modification of decisions; request for accelerated disposition of protest.
>
> (a) Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. Upon the request of the protesting party, filed within the time allowed for the filing of a protest under section 1514 of this title, a protest may be subject to further review by another appropriate customs officer, under the circumstances and in the form and manner that may be prescribed by the Secretary in regulations, but subject to the two-year limitation prescribed in the first sentence of this subsection. Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary.
>
> (b) A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1582 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

The defendant concludes from the foregoing statute that the failure of a customs official to either allow or deny a protest within a period of two years from the day of its filing constitutes a constructive denial thereof, causing the 180-day time limitation to automatically begin running on the day immediately following the last day of said two-year period, namely—April 26, 1974. By the time the summons

was actually filed on November 7, 1974, the defendant charges that a total period of 196 days had elapsed thus causing the filing of the summons in question to be untimely.

This court is unable to accept the contention urged by the defendant. It appears that in its reasoning the defendant misconceives the purpose and the intent evidenced by the Congress in the enactment of 19 U.S.C., section 1515(a). The foregoing section relates to the manner in which administrative review shall be conducted and determined by customs officials. It is regulatory in character and prescribes the period of time and the form in which the obligations and responsibilities of these officials are to be performed. The specific obligation is imposed thereby on customs to mail a notice of denial to a protestant. This section does not serve as a statute of limitation with respect to the commencement of an action, but only provides for the act or occurrence from which the 180-day time limitation provided by 28 U.S.C., section 2631(a)(1) begins to run.

It is this latter section (section 2631(a)(1)) which imposes the limitation period on the commencement of a court action and specifies when this period commences. The language of this section is plain and unequivocal. The 180-day limitation period begins to run *not* from the date a protest is denied, but from the date the notice of denial is *mailed* to the plaintiff. Thus. until the independent, though related, obligation to mail the notice of denial is complied with by customs, the corresponding obligation imposed on the plaintiff by 28 U.S.C., section 2631(a)(1), to file a summons within 180 days thereafter does not attach. To accept the defendant's contention that the 180-day limitation period automatically commences by operation of law in cases where no administrative review of a protest occurs within two years of its filing, would not only ignore the unambiguous phraseology of 28 U.S.C., section 2631(a)(1), but would also dispense with the directive contained in 19 U.S.C., section 1515(a) that customs mail notices of denial to protestants in all such cases.

Had Congress intended the automatic commencement of the 180-day limitation period after two years of administrative inaction on a protest by customs, it, indeed, would have expressly so provided. The intent of Congress is clearly evidenced by the contrasting statutory provisions relating to a protest subject to accelerated disposition. 19 U.S.C., section 1515(b) provides that a protest, which has not been allowed or denied within 30 days following the date of mailing of a request for an accelerated disposition is deemed denied. With respect to the protest subject to accelerated disposition, the Congress has placed the affirmative burden on the plaintiff to commence an action by the filing of a summons within 180 days after the date of the con-

structive denial. No notice of denial is required to be mailed by customs. Accordingly, in the same manner that section 2631(a)(1) refers to section 1515(a) in order to specifically provide the time and/or occurrence from which the 180-day limitation period commences (date of mailing notice of denial), so in the case of a protest subject to accelerated disposition, section 2631(a)(2) refers to section 1515(b) for the purpose of providing the specific but dissimilar time and/or occurrence from which the 180-day limitation period commences (the 30th day following the mailing of a request for accelerated disposition). To place a construction on 19 U.S.C., section 1515(a) and 28 U.S.C., section 2631(a)(1) where accelerated disposition is not requested, as urged by the defendant, would destroy the very distinction so patently intended by the Congress.

The legislative history of the Customs Courts Act of 1970 illustrates the intent of Congress with respect to the issue presented by the present motion. In its formative stages the Senate Bill 2624, which eventually became the 1970 Act, contained an additional subsection (c) amending section 515 of the Tariff Act of 1930 and providing for the constructive denial of protests after a period of two years without administrative action. The proposed subsection provided in pertinent part:

> Sec. 515. Review of Protests.—
>
> (c) Constructive Denial of Protest.—Any protest which has not been allowed or denied in whole or in part in accordance with paragraph (a) of this section * * * shall be deemed denied after two years have elapsed from the date the protest was filed in accordance with section 514 of this Act. [S. 2624, 91st Cong., 1st Sess. § 208 at pp. 25–26. (Introduced July 14, 1969).]

At the hearings conducted in connection with the proposed Senate Bill, strenuous objection was made with respect to the foregoing provision relating to constructive denial of *all* protests. It was contended that an intolerable burden would be imposed on importers to be required to follow the progress of each and every protest over the period of two years. Senate Hearings on S. 2624, 91st Cong., 1st Sess. at pp. 121, 136, 147, 165, 169 and 175 (1969).

In the report of the Senate Committee on the Judiciary, the proposed subsection (c) amending section 515 of the Tariff Act of 1930, *supra*, was deleted. Senate Report No. 91–576, Amendment No. 14, p. 4 (1969). The reasoning of the Senate Committee is clearly stated in its report at pages 29–30:

> Your Committee has stricken section 515 (c) as it would have been added by S. 2624. That proposed subsection provided that protests which are not affirmed or denied on their merits within

> 2 years following the date of filing would be deemed denied at the end of that 2 year period. Such a provision would impose on the importer of record the burden of following his protest continuously in order to determine when the 180 day period within which a summons must be filed in the Customs Court begins to run, *as no notice of the expiration of the 2 year period was required.*
>
> In view of the expectation of the Treasury Department that generally protests will not require significantly more time for review than the time required under existing law, *your Committee has eliminated the constructive denial procedure.* Instead, proposed section 515 (a), in the bill as it was introduced, has been revised to impose an obligation on the Bureau of Customs to act on the merits of all protests within 2 years from the date on which they are filed and to mail notice of all denials to the protesting party in each case. [Emphasis supplied.]

In lieu of the deleted subsection (c), the Senate Bill substituted section 112 which as explained on page 17 of the Senate Report, *supra*:

> * * *completely revises section 2631 to title 28, United States Code. It formerly set forth the procedures for appeal to the Customs Court in reappraisement disputes. The new section establishes the time for commencing an action in the Customs Court.
>
> Section 2631 (a) requires that a suit on a protest denied pursuant to section 515 (a) of the Tariff Act of 1930, as amended, be brought within 180 days after the date of mailing of notice of its denial, in whole or in part, or within 180 days after the date of denial of a protest by operation of law pursuant to the provisions of section 515 (b) of the Tariff Act of 1930, as amended.

Thus, in the Customs Courts Act of 1970, as ultimately enacted, the time for the commencement of a court action by the filing of a summons is specifically tied to the mailing of the notice of denial of protest. In every action, other than those actions in which there has been a request for an accelerated disposition under the provisions of 19 U.S.C., section 1515(b), customs has been given the affirmative obligation to notify the importer of the denial of his protest. The mailing of this notice of denial has been made the prerequisite to the commencement of the 180-day time limitation period. See S. Report No. 91–576, 91st Cong., 1st Sess., pp. 17, 29–30 (1969).

The defendant submits that the denial of its motion to dismiss may lead to an anomalous result of allowing customs to delay the mailing of notices of denial *ad infinitum* despite the fact that customs has the affirmative obligation by statute to allow or deny all protests within a period of two years of their filing. The defendant argues at length that the Congress did not foresee such a particular eventuality, thus permitting "a projected construction" of congressional intent beyond and in variance with that expressed in the explicit language of the statute.

Contrary to the hypothesis of defendant's counsel, the report of the Senate Committee evidences that full consideration was given to the two-year period of review of protests granted to customs in the act. In fact, witnesses for the Treasury Department testified that a majority of all protests were fully processed within 90 days of their receipt. (See S. Report No. 91–576, 91st Cong., 1st Sess., p. 28 (1969).) To ignore explicit statutory language because of an unanticipated possibility that customs willfully or otherwise might fail to mail a notice of denial is not "an act of projection" of legislative intent, as urged by the defendant, but a usurpation of the legislative prerogative by means of judicial construction.

However, a further consideration of such an "anomalous result," as submitted by the defendant, is unnecessary, for in the present proceeding the mailing of a notice of denial is without dispute and, accordingly, not in issue. Moreover, this court is unwilling to presume that customs officials would intentionally be guilty of such bad faith and conduct as would be present where notification of a denial of a protest is withheld specifically to prevent judicial review. The delay in the mailing of a notice of denial in the present case must be presumed to have been inadvertent. The court is confident that the normal standard of diligence by customs officials is one in which both the denial of a protest and the subsequent mailing of notice thereof to the importer occur well within the two-year period contemplated in 19 U.S.C., section 1515(a).

Accordingly, the court is of the opinion that the summons in the above-entitled action was timely filed and that the defendant's motion must be denied.

Let an order be entered accordingly.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *June 13, 1977.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

G. R. DICKERSON,
Acting Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P77/85	Ford, J. June 6, 1977	The Emporium Capwell Company et al.	69/39303, etc.	Item 653.37 17%, 15% or 13% Item 653.40 19%	Item 653.35 10.5%, 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/86	Ford, J. June 6, 1977	Jack Housman, Inc.	70/31481, etc.	Item 653.37 15%	Item 653.35 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	Dallas (Houston) Candlesticks, candleholders, etc.

P77/87	Ford, J. June 6, 1977	Mark Ross & Co. et al.	68/59478, etc.	Item 653.37 17%, 15%, 13%, 11% or 9.5% Item 653.40 19%	Item 653.35 10.5%, 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/88	Ford, J. June 7, 1977	The Candlestick et al.	70/07582, etc.	Item 653.37 17% or 15%	Item 653.35 10.5%, 9% or 8%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Candlesticks, candleholders, etc.
P77/89	Ford, J. June 7, 1977	General Time Corp.	70/21706	Item 730.93 14%	Item 680.45 7%	American Laubscher Corp. et al. v. U.S. (C.D. 4006)	Atlanta (Savannah) Pinions and gears
P77/90	Maletz, J. June 7, 1977	Nadel & Sons Toy Corp.	68/46974, etc.	Item 737.90 35%, 31% or 28%	Item 734.20 11%, 9% or 8%	Mego Corp. v. U.S. (C.A.D. 1137)	New York "Pin ball game" or "baga- telle game"; game ma- chines.
P77/91	Landis, J. June 8, 1977	Byer-Rolnick	76-9-01955	Item 702.37 10%	Item 702.40 6¢ per doz. pcs. +5%	Judgment on the pleadings	Dallas (Houston) "Panama hatbodies"
P77/92	Watson, J. June 8, 1977	Brentwood Originals	74-7-01729, etc.	Item 366.60 40% Item 366.63 32%	Item 363.30 10%	Brentwood Originals v. U.S (C.D.'s 4572, 4655)	Los Angeles Velveteen and corduroy covers for bolsters and bedrests
P77/93	Watson, J. June 8, 1977	Teters Floral Products Co., Inc., et al.	74-9-02672, etc.	Item 748.20 21%	Item 774.60 8.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Armbee Corporation et al. v. U.S. (C.D. 3278)	Tacoma (Seattle) Plastic artificial flowers, etc.
P77/94	Newman, J. June 8, 1977	The Ashflash Corpora- tion	73-2-00531, etc.	Item 683.80 13¾%	Item 688.40 9%, 6.5% or 5.5%	Judgment on the pleadings The Ashflash Corporation v. U.S. (C.D. 4643)	New York; Seattle; Los Angeles Combination lanterns and signaling lights

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decision

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R77/42	Richardson, J. June 6, 1977	Patrick & Graves	R65/23713, etc.	Cost of production	DM3349.00 (type 113, 1964); DM3494.48 (type 113, 1965 and 1966)	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles, type 113

Decision on Motion for Rehearing

JUNE 6, 1977

MOBAY Chemical Corp. *v.* United States, Court Nos. 72–6–01283, 72–3–00745 and 73–7–01790 dismissed from consolidated Court No 70/36742 for lack of jurisdiction.—URETHANE PASTES.—C.D. 4685. Motion by plaintiff granted; order dismissing said actions vacated; urethane pastes embraced by said actions are properly classifiable as plastics materials under item 405.25 TSUS, in accordance with order and decision in C.D. 4685; entries shall be reliquidated accordingly.

Petition for Rehearing Before the United States Court of Customs and Patent Appeals

JUNE 2, 1977

Appeal 76–25.—Walker International Corp. *v.* United States.
Appeal 76–26.—Walker Trading Corp. *v.* United States.

FAILURE TO FILE SUBSTITUTION OF ATTORNEYS—ACTIONS DISMISSED.—Orders of January 23, 1976 (not published), reh. denied March 22, 1976, affirmed May 12, 1977. C.A.D.'s 1190 and 1191. Petition by appellants.

Judgment of the United States Customs Court In Appealed Case

JUNE 9, 1977

APPEAL 76–10.—United States *v.* Aceto Chemical Co., Inc.—FUNGICIDE ("THIRAM, WETTABLE POWDER")—BENZENOID MIXTURE—THIURAM—TSUS—SUMMARY JUDGEMENT.—C.D. 4625 affirmed April 21, 1977. C.A.D. 1186.

Appeal to United States Court of Customs and Patent Appeals

APPEAL 77-20.—United States *v.* The De Laval Separator Company.—ON-FARM BULK MILK TANKS—REFRIGERATORS AND REFRIGERATING EQUIPMENT—AGRICULTURAL EQUIPMENT—TSUS. Appeal from C.D. 4693.

In this case merchandise described on the invoice as "farm tanks without refrigeration units" was classified under item 661.35, Tariff Schedules of the United States, as "refrigerators and refrigerating equipment, whether or not electric , and parts thereof" and assessed with duty at 6 percent ad valorem. The Customs Court sustained plaintiff-appellee's claim that the merchandise was entitled to entry free of duty under item 666.00 as "on-farm equipment for the handling * * * of agricultural * * * products, and agricultural * * * implements not specially provided for, and parts of any of the foregoing."

It is claimed that the Customs Court erred in finding and holding that the merchandise in issue is properly classifiable under item 666.00, *supra*; in not finding and holding that the merchandise was properly classified under item 661.35, *supra*; in finding and holding that it was the intent of the Congress to have merchandise such as that in issue classified under item 666.00, as opposed to item 661.35; assuming that the merchandise in issue is described in item 666.00, then, in not finding and holding that it is more specifically described by item 666.35; in not finding and holding that all applicable headnotes in the TSUS require that the merchandise at issue be classified under item 661.35, as opposed to item 666.00.

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